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No. 946

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IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN WOODY
and
192 ADDITIONAL PETITIONERS,

vs.

STERLING ALUMINUM PRODUCTS, INC.
and
INTERNATIONAL ASSOCIATION OF MACHINISTS
and
DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LOCAL LODGE NO. 41 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LARRY CONNORS, Directing Business Representative, District No. 9, I. A. of M.,
and
RUSSELL DAVIS, Business Representative, District No. 9, I. A. of M.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari, Of Respondents, International Association of Machinists, District No. 9, International Association of Machinists, Local Lodge No. 41 of the International Association of Machinists, Larry Connors, Directing Business Representative, District No. 9, I. A. of M., and Russell Davis, Business Representative, District No. 9, I. A. of M.

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JURISDICTION.

Jurisdiction of the Supreme Court is invoked by Petitioners under the Act of June 25, 1948, C. 646 (1), 62 Stat. 928 (1), Title 28, U. S. C. A., § 1254.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is reported at 365 F. 2d 448, and also appears as Appendix A to Petitioners' petition for Writ of Certiorari, pages 9-23. The District Court entered two opinions, the first being reported at 244 F. Supp. 84 (January 21, 1965), and the second at 243 F. Supp. 755 (July 21, 1965).

QUESTIONS PRESENTED.

We submit that the questions presented should not be predicated upon hypothetical assumptions outside the record as Petitioners have presented them. For example, there is nothing in the record to support the statement that the Union has abandoned Petitioners. Accordingly these Respondents submit the following revised questions:

1. May Petitioners, without first attempting use of the internal contract grievance procedure, seek federal court aid to compel their former employer, Respondent Sterling Aluminum Products, Inc., to bargain and/or arbitrate with their Chief Steward and Stewards regarding the termination of their employment and the relocation of the manufacturing plant after the termination of the collective bargaining agreement between their former employer and their collective bargaining representative, Respondent District No. 9, International Association of Machinists?

2. May Petitioners maintain a suit for damages in federal court against their union for an alleged breach of the union's duty of fair representation based, not upon breach of contract, but upon an alleged conspiracy between the employer and their union where the conduct complained of is at least arguably protected by Section 7 of the National Labor Relations Act, 29 U. S. C. A., Section 157, or constitutes unfair labor practices prohibited by Section 8 of the Act, 29 U. S. C. A., Section 158?

STATEMENT OF THE CASE.

Petitioners are former employees of Respondent Sterling Aluminum Products, Inc., sometimes hereinafter referred to as "Sterling". Each Petitioner belonged to and was represented by Respondent, District No. 9, International Association of Machinists, sometimes hereinafter referred to as "the Union", which was certified as the exclusive bargaining agent for Petitioners as employees of Sterling (R. 122-124).

The collective bargaining agreement between Sterling and the Union was executed on May 5, 1961, became effective as of March 1, 1961, and expired February 28, 1963 (R. 63, 128). Under the terms of said contract, Sterling recognized the Union as the exclusive collective bargaining agent for all of its machinist employees (which included Petitioners) in the Company's St. Charles plant (R. 32).

On December 26, 1962, Sterling advised the Union by letter that it had decided to cease permanently all manufacturing in its St. Charles plant at the close of business on February 28, 1963, and that the labor agreement would be terminated at the close of business on February 28, 1963 (R. 89, 90). On the same date the Union gave Sterling written notice of its desire to terminate said labor agreement, and that proposed amendments would follow at a later date (R. 90). Such contract proposals were sent to Sterling by the Union by letter dated December 28, 1962 (R. 91, 92, 155-160). On January 14, 1963, Sterling advised the Union by letter that on February 28, 1963 the St. Charles plant would close down permanently, that the labor agreement would terminate on February 28, 1963, and that since the Union did not represent any of Sterling's employees at any plant other than the St. Charles plant, no negotiation of any new contracts would be under-

taken (R. 92, 93). Sterling did close down its St. Charles plant as of February 28, 1963 (R. 95-100).

On September 13, 1963, Petitioners filed their original complaint against Sterling and Respondent Unions and Union Representatives, in which they sought over Nineteen Million Dollars damages under four separate Counts (R. 1, 13-27). On October 29, 1963, Respondent Unions and Union Representatives filed motions to dismiss, to strike, to quash service of summons and for a more definite statement (R. 2, 3). Similar motions were also filed by Sterling and by Lincoln National Life Insurance Company, which was also then named as a Defendant under Count IV (R. 3). On November 15, 1963, after a hearing on said motions by the Court, Petitioners were directed to file an amended complaint, setting forth a jurisdictional statement, and on November 26 Petitioners filed their first amended complaint (R. 4). Thereafter, all of the Respondents filed motions to strike, to dismiss and for more definite statements. With respect to Petitioners' first amended complaint, said motions were argued, briefed and submitted to the Court after further, additional oral argument (R. 5, 6). In addition, both Petitioners and Sterling filed motions for summary judgment on Count III (R. 6). On January 21, 1965, the District Court entered its order sustaining all Respondents' motions to dismiss Counts I, II and IV, overruled Petitioners' motion for summary judgment on Count III, and sustained Sterling's motion for summary judgment on Count III (R. 101-116). On January 26, 1965, the District Court amended its order of January 21, and granted Petitioners ten (10) days within which to file an amended complaint (R. 117).

In the course of its Memorandum Opinion of January 21, the Court stated, in referring to Counts I and II that:

> "Neither Count in substance alleges a breach of a collective bargaining agreement between a labor

> organization and an employer or between labor organizations in an industry affecting commerce, hence jurisdiction cannot be predicated on 29 U. S. C. A. 185. * * * Both counts fairly may be construed to allege interference with activities protected by 29 U. S. C. A. 157 and conduct prohibited by 29 U. S. C. A. 158. However, jurisdiction over these matters is committed in the first instance to the National Labor Relations Board and not to this Court. * * * Insofar as Plaintiffs alleged a federal question basing their action on a federal right granted under 29 U. S. C. A. 159, they have not alleged facts bringing them within the one class of cases, beginning with and typified by **Syres v. Oil Workers' International Union, Local No. 23, et al.**, 350 U. S. 892, which recognizes the federal right when hostile discrimination is alleged. No discrimination is asserted here, hostile or otherwise."

On January 30, 1965, Plaintiffs filed their second amended complaint (R. 121-148). As filed, that complaint contained six counts. However, on February 17, 1965, Plaintiffs dismissed Count IV without prejudice (R. 110). Count III, which is directed against only Sterling, merely re-adopts the allegations contained in Count III of the first amended complaint, and takes note of the summary judgment entered in favor of the Company and against Plaintiffs on Count III.

Petitioners asserted that the District Court had jurisdiction of their complaint under Sections 151, 152, **157, 158,** 159, 160 and 163 of the National Labor Relations Act; Sections 141-144, 177, 173 (d), 185 and 186 of the Labor Management Relations Act; Sections 401, 402, 411-415, 483 of the Labor Management Reporting and Disclosure Act; **and even under Sections 151-158 of the Railway Labor Act** (R. 122).

It is almost an impossible task to understand or summarize the allegations of Count I, because the facts and conclusions of law alleged, the alternative and inconsistent allegations and theories, the broad, but unspecific claims of jurisdiction are so intermingled as to be completely confusing and almost incomprehensible. Perhaps the best and fairest way to set forth the nature and theory of Count I of the second amended complaint is simply to accept Petitioners' own statement contained in the second amended complaint as to the theory and nature of Count I. At R. 125, Petitioners allege:

> "This Count of Plaintiffs' Complaint is predicated and founded upon an illegal and unlawful conspiracy and series of collusive acts comprising a deliberate, pre-determined and illegal plan and scheme contrived and entered into by the Defendant, Sterling, by and through its agents and corporate officers, and the Defendant Labor Organizations and the Labor Organization Officials, Connors and Davis. The purpose of the collusion and conspiracy by and between these Defendants was to allow the Defendant, Sterling, to close down its plant in St. Charles, Missouri, and permanently terminate the employment and union recognition of all of these Plaintiffs and to attempt to eliminate and avoid any contractual and/or legal liabilities to these Plaintiffs as a result of the permanent loss of their employment and the loss of the recognition of their Union * * *."

Count II of the second amended complaint is merely a re-allegation of the averments of Count I, with the addition of a claim for exemplary damages based upon the alleged wilfulness of the conduct alleged. Count V is substantially the same as Count II of the first amended complaint. It re-alleges the averments of Count I of the second amended complaint as they relate to Respondent Unions and Union Representatives, and asserts that the

conduct complained of constitutes a breach of the obligation of these Respondents to represent Petitioners fairly and without hostile discrimination. Count VI simply involves a demand for punitive damages on account of the alleged wilfulness of the conduct set forth in Count V.

Thereafter, on February 26, 1965, Respondent Unions and Union Representatives filed their motions to dismiss, to strike and for a more definite statement. The motion to dismiss was based on the following grounds:

1. The Court lacks jurisdiction of the subject matter because the action does not arise under the Constitution of the United States or under the laws of the United States.

2. The acts, activities and conduct of these Defendants complained of in Counts I, II, V and VI are subject to the protections or prohibitions of the National Labor Relations Act and are, therefore, subject to the sole and exclusive jurisdiction of the National Labor Relations Board.

3. Counts I, II, V and VI were not brought within the time limited for such actions, and are barred by the Statute of Limitations.

4. Plaintiffs have been guilty of laches and unreasonable delay in bringing this action, and should be estopped from bringing such action.

5. Plaintiffs have failed to allege that they exhausted their contractual remedies before filing this suit.

6. Counts I, II, V and VI fail to state a claim against said Defendants, or any of them, upon which relief can be granted.

7. Plaintiffs have made an election of remedies under which they have elected to affirm the collective bargaining agreement, and sought to obtain a remedy for all

breaches of contract by Defendant Company under Plaintiffs' Motion for Summary Judgment (R. 82, 143), based on said collective bargaining agreement, and should be precluded and estopped from maintaining claims under Counts I, II, V and VI under which they complain of the conduct of Defendants in negotiating and bringing into existence said collective bargaining agreement (R. 204-206).

Sterling also filed a motion to strike for violation of Rule 8, a motion to require Petitioners to make a coherent separation of the asserted jurisdictional grounds, a motion to dismiss and a motion to strike (R. 220-228).

Thereafter, all the motions of the parties were orally argued, briefed and submitted to the Court. On July 1, 1963, the District Court issued its Memorandum Opinion and Order (R. 232-269) in which it was ordered that Plaintiffs' motion for a new trial on Count III be overruled, that Plaintiff's motion for summary judgment against Defendant Sterling be denied, that Defendants' motions to dismiss Plaintiffs' second amended complaint be sustained, and that said second amended complaint and each of the Counts thereof be dismissed, all at Plaintiffs' costs (R. 269).

The District Court in its first Memorandum Opinion discussed the events leading up to the signing of the May 5, 1961, collective bargaining agreement as follows:

> "The 1961-1963 contract was negotiated in settlement of a five-months' strike at the St. Charles plant. One of the major issues of that strike was whether Defendant would agree to any severance pay. A frequent topic in negotiations was the possibility that the Company might move its production out of St. Louis" (R. 109).

The contract, as finally negotiated and executed on May 5, 1961, contained a provision which gave the Company the

right at any time during the term of the contract (which by its terms expired on February 28, 1963) to close its plant at St. Charles, or any portion thereof, and to terminate the employment of individuals. **The agreement provided, further, that any employee whose employment was so terminated was entitled to a seniority termination allowance to be computed in accordance with a prescribed formula.** It also was provided that temporary layoffs during the contract term would not constitute termination entitling the employee laid off to such seniority termination pay. The contract further provided that "It was expressly understood at the expiration of this two-year contract the Company shall have the right to close down permanently the St. Charles plant, to relocate permanently any department thereof or discontinue permanently any such department, without seniority termination pay" (Subpar. j, Section 1, Article IV, Seniority, R. 45, 46).

Petitioners' claim for seniority termination pay as set forth in Count III of the first and second amended complaints was predicated on the aforementioned subparagraph (j).

In overruling Petitioners' second motion for a summary judgment, the District Court pointed out that the complaint alleges that District No. 9 was certified as the exclusive bargaining agent in behalf of Plaintiffs "in accord with the provisions of the National Labor Relations Act of the United States," and holds that under the statute the "bargaining" must be "collective," through "representatives," and, therefore, Plaintiffs as individuals may not compel Sterling to "bargain" with them (R. 249). The District Court pointed out that the parties to the contract (Sterling and the Union) actually "bargained" with respect to the right of Sterling to close its St. Charles plant and re-locate its facilities. "The results of that bargaining were the express contractual provisions recog-

nizing the right of Sterling 'to close down permanently the St. Charles plant, to re-locate permanently any department thereof or to discontinue permanently any such department' " and, we might add, provision for the payment of seniority termination pay. The Court further stated that "although Plaintiffs complained that these and other provisions of the agreement (e. g., the limited recognition clause) were bargained for in bad faith, they nevertheless concede that the contract as negotiated is binding upon them and seek Section 301 relief on that theory. They are, therefore, in any event, in no position to insist upon renewed bargaining as individuals over issues that were resolved two years earlier, when the instant contract was negotiated and the strike settled" (R. 249).

The District Court further held that even if there was a legal basis for an individual employee or former employee to obtain specific performance of the preliminary grievance procedure prescribed by the contract here in question, under the undisputed facts, Plaintiffs, having failed to comply with the first two steps of the grievance procedure, having delayed some eighteen (18) months before requesting the Court to order Defendant Company to bargain with it on said grievances, and having permitted a fundamental and long-lasting change in the relationship of the parties to take place prior to the demand for arbitration, are now precluded as a matter of law from obtaining such an order (R. 250-259).

The District Court next considered Plaintiffs' claim for relief based on the alleged collusion and conspiracy, as set forth in Count I. The Court found that stripped to its essentials, the conspiracy claim is premised on alleged bad faith bargaining between Sterling, on the one hand, and representatives of the Union, on the other. The Court found that Plaintiffs, having noted the Court's observation in its first Memorandum Opinion of January 21, 1965, that

no discrimination, hostile or otherwise, was asserted as a basis for their claim, "have now interpolated into the allegations of the conspiracy charge vague conclusions of allegedly 'hostile discrimination,' this phrase evidently being used by Plaintiffs simply as words of color to characterize the allegedly collusive actions of the Unions." The Court declared, however, that "the pleaded facts demonstrate there was no discrimination at all" (R. 259). The District Court went on to find that under the allegations of the second amended complaint, all the employees represented by District No. 9 were treated alike, and without discrimination, hostile or otherwise (R. 262).

The Court held that, as it construed the allegations of the second amended complaint, Plaintiffs charge in substance that both the Employer and the Unions failed and refused to bargain collectively and to confer in good faith in respect to wages, hours and other conditions of employment, and thereby interfered with the employees of Sterling in the exercise of rights guaranteed to them by Section 157, 29 U. S. C. A. The District Court held that the activities of which Plaintiffs complain are at least arguably protected by Section 7 of the National Labor Relations Act, 29 U. S. C. A., Section 157, or constitute unfair labor practices prohibited by Section 8 of the Act, 29 U. S. C. A., Section 158, and therefore are subject to the exclusive, primary jurisdiction of the National Labor Relations Board. Acordingly, the Court held that it did not have jurisdiction to determine the merits of the claim (R. 262, 263).

The Court next considered the claims for relief with respect to the alleged breaches of contract. With respect to the claim for failure to pay seniority termination allowances, the Court held that it had Section 301 jurisdiction, and had granted Defendant Company a summary judgment on Count III in its Memorandum Opinion of January, 1963.

The District Court held with respect to Plaintiff's claim for vacation allowances, that it was premised on the theory of a temporary lay-off on February 27, 1963, as distinguished from a termination of employment at the close of the business day of February 28, 1963, and that the facts which sustain the Court's grant of a summary judgment on the seniority termination claim are equally applicable to the claim for vacation allowances, inasmuch as Plaintiffs were not temporarily laid off, nor was their employment terminated during the term of the collective bargaining agreement. The Court held that the disposition of the seniority termination claim necessarily impels dismisal of the factually related vacation allowance claim.

The District Court sustained Defendants' motions to dismiss Count I. The District Court held that its disposition of Count I necessarily results in a dismissal of Count II, which merely sought exemplary damages based upon the alleged wilfulness of the conduct alleged in Count I (R. 268).

The District Court found that Count V is substantially the same as Count II of the first amended complaint, and merely re-alleges the averments of Count I of the second amended complaint as they relate to Defendant Unions and Union Representatives, and asserts that the conduct complained of constitutes a breach of the obligation of these Defendants to represent Plaintiffs fairly and without hostile discrimination. The Court declared that as it had held in Count I, the activities complained of are arguably and potentially unfair labor practices over which the National Labor Relations Board has exclusive, primary jurisdiction. Since Count VI simply involves a demand for punitive damages on account of the alleged wilfulness of the conduct set forth in Count V, the Court's ruling on Count V is also dispositive of Count VI. The Court, accordingly, sustained Defendants' motions to dismiss Counts I, II, V and VI (R. 268, 269).

The Court of Appeals affirmed the judgment of the District Court. With respect to Petitioners' claim for breach of contract against Sterling under Count III of its Second Amended Complaint, the Eighth Circuit held that, while it agreed with the District Court that Petitioners were not entitled to judgment for termination allowances, Petitioners' failure to utilize the contract grievance procedure precludes their right to maintain the Count III action under the holding of this Court in **Republic Steel Corp. v. Maddox**, 379 U. S. 650 (1965).

With respect to Petitioners' claims of unfair representation againt Respondent Unions and Union Representatives based on an alleged conspiracy and collusion between Sterling and the Union, the Court of Appeals agreed with the District Court's holding that the claims of unfair representation against the Union and Union Representatives were not predicated upon the collective bargaining agreement so as to give the Court jurisdiction under Section 301, but were within the exclusive jurisdiction of the National Labor Relations Board. The Court of Appeals then held (at pages 22, 23, Appendix A, Petition for Writ of Cert.):

> "* * * We think it is at least arguable that these allegations, if true, would be an unfair labor practice within the protection of § 7 and prohibition of § 8 of the Act 'although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act . . .' **Humphrey v. Moore**, 375 U. S. 335 (1964). Unlike **Moore**, however, plaintiffs' allegations here are not contract oriented and not, therefore, 'within the cognizance of federal and state courts'."

ARGUMENT.

I.

May Petitioners without first attempting use of the internal contract grievance procedure, seek federal court aid to compel their former employer, Respondent Sterling Aluminum Products, Inc., to bargain and/or arbitrate with their Chief Steward and Stewards regarding the termination of their employment and the relocation of the manufacturing plant after the termination of the collective bargaining agreement between their former employer and their collective bargaining representative, District No. 9, International Association of Machinists?

This Court held in **Republic Steel Corp. v. Maddox** (1965), 379 U. S. 650, 85 S. Ct. 614, 58 LRRM 2193, that "individual employees wishing to assert contract grievances must **attempt** use of the contract grievance procedure agreed upon by employer and union as the mode of redress," before they may invoke the jurisdiction of the courts to remedy such grievances. In the case at bar the bargaining agreement contains four steps detailing the internal grievance procedure for exclusive settlement of all differences between the employees individually and collectively and Respondent Sterling (pages 15, 16, Appendix A, Petition for Writ of Cert.). The Court of Appeals found that there was no allegation in the pleadings or offer of proof that any attempt was made to use this contract grievance procedure and stated:

> "The admitted fact as seen from plaintiff Woody's affidavit is that no grievance was ever processed to the first procedural step. We have no authority to ignore or exceed the contract as it is both the source and extent of the aggrieved employee's rights under § 301."

Accordingly, Petitioners' failure to utilize the contract grievance procedure precludes them from invoking the jurisdiction of the courts to compel Respondent Sterling to bargain and/or arbitrate with them concerning the termination of their employment and the relocation of the company's plant.

Moreover, Petitioners have no standing to compel Respondent Sterling to bargain and/or arbitrate as prayed. It is generally held that individual employees may not by-pass their union representative and compel their employer to arbitrate with them directly. **Black-Clawson Co., Inc. v. International Ass'n of Mach.**, 2 Cir., 313 F. 2d 179 (1962); **Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co.**, 2 Cir., 312 F. 2d 181 (1962); **Local Union No. 12405, Dist. 50 UMW v. Martin Marietta Corp.**, 7 Cir., 328 F. 2d 945 (1964); **Ostrofsky v. United Steelworkers**, D. Md. 1959, 171 F. Supp. 782, aff'd 4th Cir., 1960, 273 F. 2d 614, cert. denied, 1960, 363 U. S. 849, 80 S. Ct. 1244.

In the case of **Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.**, supra, the Court stated at l. c. 184:

> "Moreover, the right to arbitrate is in no sense an incident or a 'condition' of the employer-employee relationship as such, but depends in exactly the same degree as does the union's right to arbitrate on the existence of an agreement to arbitrate. In the absence of such an agreement no employee has the right to compel his employer to arbitrate any matter whatsoever. * * * The attempt to argue for a transfer of the right to arbitrate from union to employees upon the expiration of the collective bargaining agreement finds no support whatever in authority or logic."

With regard to Petitioners' alternate request for a bargaining order against Respondent Sterling, clearly, an employer is obligated to bargain only with the duly recog-

nized or certified representative of its employees." **May Department Stores Co. v. Labor Board,** 326 U. S. 376, 383-384. Petitioners admit in their pleadings that Respondent District No. 9, International Association of Machinists is their certified exclusive bargaining agent (R. 124). The U. S. District found "that the 'indisputable' facts of record, evidenced by the collective agreement, demonstrate that the parties to the contract (Sterling and the Union) actually 'bargained' with respect to the right of Sterling to close its St. Charles plant and relocate its facilities. The results of that bargaining were the express contractual provisions recognizing the right of Sterling to close down permanently the St. Charles plant, to relocate permanently any department thereof or to discontinue permanently any such department" (Fn. 3, R. 249).

Accordingly, we submit in light of the above and foregoing facts and authorities that Petitioners clearly are not entitled to an order requiring Respondent Sterling to bargain and/or arbitrate with their Chief Steward and Stewards regarding the termination of their employment and the relocation of the company's manufacturing plant.

II.

May Petitioners maintain a suit for damages in federal court against their union for an alleged breach of the union's duty of fair representation based, not upon breach of contract, but upon an alleged conspiracy between the employer and their union where the conduct complained of is at least arguably protected by Section 7 of the National Labor Relations Act, 29 U. S. C. A., Section 157, or constitutes unfair labor practices prohibited by Section 8 of the Act, 29 U. S. C. A., Section 158?

The Court of Appeals, in attempting to summarize Petitioners' complaint and the legal issues, stated that the case was "made complex and annoyingly difficult because of the garbled, overlapping and contradictory allegations of the pleadings," and declared that if the Dis-

trict Court, having found the second amended complaint violative of Fed. R. Civ. P. 8 (a) and (e), had dismissed it under Rule 8, the Court of Appeals would have been inclined to sustain the ruling (Appendix A, pages 10, 17, Petition for Writ of Cert.).

Petitioners' claims against Respondent labor organizations and representatives are so confused and conflicting as to almost defy clear statement or rational analysis. Apparently, Petitioners charge Respondent labor organizations and representatives with unfair representation in the negotiation of the collective bargaining agreement with Respondent Sterling executed on May 5, 1961, and effective as of March 1, 1961.

Petitioners state on page 3 of their Petition for a Writ of Certiorari that:

> "The disputes and this litigation arose because of a claim by the employees that their Union had conspired with the company to include certain clauses in the labor agreement which purportedly gave the Company the right to relocate the St. Charles, Missouri, plant and terminate the employment of the machinist employees (R. 128 to 131, sub-paragraphs (e), (f) and (g))."

And at page 5 of their Petition, Petitioners state that: "The claims against this respondent Union and its officers are 'private wrongs . . . as a result of tortious conduct' (Miranda, 326 F. 2d 172 at 180)." Petitioners in their Brief to the Court of Appeals repeatedly characterized their claims against Respondent Unions and representatives as tort claims.

In addition, Petitioners have requested separate and different treatment for the claims for breaches of contract against Respondent Sterling. Petitioners requested the courts below to grant them summary judgment against Sterling on said breach of contract claims. In paragraph

5 of Plaintiffs' Motion for Order of Summary Judgment against Respondent Sterling, Petitioners stated (R. 145):

> "Plaintiffs state that the requested Order of this Court will not conflict, in any way, with the remaining allegations of the Plaintiffs' Second Amended Complaint in regard to the collusion, conspiracy, etc., of the Defendant Sterling, and the breach of duty of the Defendant Unions, for the reason that the alleged disputes arising out of the labor agreement must be resolved before the allegations of conspiracy, collusion, breach of duty, etc., set out in the Plaintiffs' Second Amended Complaint should be properly considered by the Court in the ultimate trial of this litigation."

In addition to the above, Petitioners refer to certain unresolved grievances at page 4 of their Petition for Writ of Certiorari. We are unable to determine from the Petition whether Petitioners are here claiming that Respondent Unions and representatives have unfairly refused to process such grievances. In any event, the Court of Appeals found that in this case, unlike the situation presented in **Humphrey v. Moore**, 375 U. S. 335, 11 L. Ed. 2d 370, 55 LRRM 2031 (1964), that Petitioners' allegations here are not predicated upon a breach of the collective bargaining agreement (Appendix A, pages 22, 23, Petition for Writ of Cert.).

Petitioners' charges of unfair representation against Respondent unions and representatives are within the exclusive primary jurisdiction of the National Labor Relations Board. **San Diego Bldg. Trades Council v. Garmon**, 1959, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775. Since 1962 the Labor Board has consistently taken the position that violations of the duty of fair representation by unions are within its jurisdiction to remedy. **Miranda Fuel Co.**, 140 NLRB 181 (1962), enf. den. 326 F. 2d 172 (2d Cir. 1963); **Independent Metal Workers' Union**

(Hughes Tool Co.), 147 NLRB 1573 (1964); **United Auto Workers**, 149 NLRB 42 (1964); **Cargo Handlers, Inc.**, 159 NLRB No. 17 (1966).

In **Local 12 Rubber Workers v. NLRB**, 150 NLRB 312 (1964), enforced 63 LRRM 2395 (5th Cir., 1966), the U. S. Court of Appeals for the Fifth Circuit, approved the NLRB's position that a union's violation of its duty of fair representation constitutes an unfair labor practice under the Act. Regarding the proper remedial forum for a claimed violation of the duty of fair representation, the Fifth Circuit held that such claims are within the primary jurisdiction of the Labor Board, subject to the single exception that if the claim is based essentially on breach of contract, the courts will have concurrent jurisdiction with the Board albeit the claim also constitutes a violation of the Act. **Humphrey v. Moore**, supra; **Smith v. Evening News Association**, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962). Violations of this hybrid nature may be submitted either to the Board as unfair labor practices, or to the courts as breaches of contract. The Court of Appeals went on to comment that:

> "The critical area requiring jurisdictional readjustment will involve those controversies, * * * where the aggrieved employee's claim is not founded on a breach of the collective bargaining contract, but rather is based squarely upon an alleged violation of the union's duty of fair representation. In this situation, the unfair labor practice jurisdiction of the Board will apparently be exclusive, totally preempting that of the courts" (footnotes omitted).

See also **NLRB v. Local 1367, International Longshoreman's Ass'n**, 63 LRRM 2559 (5th Cir., 1966).

The only other Court of Appeals which has passed on the Board's jurisdiction over charges of unfair representation was unable to arrive at a majority decision. Since only Judge Medina was of the opinion that the Board

does not have such jurisdiction this decision is not in conflict with that of the Fifth Circuit. **NLRB v. Miranda Fuel Co.**, supra.

Recent Supreme Court cases have left open the question whether a breach of the duty of fair representation constitutes an unfair labor practice (**Republic Steel Corp. v. Maddox**, 1965, 379 U. S. 650, 652, 85 S. Ct. 614, 616, 13 L. Ed. 2d 580; **Humphrey v. Moore**, 1964, 375 U. S. 335, 344, 84 S. Ct. 363, 369, 11 L. Ed. 2d 370; **Local 100, United Ass'n of Journeymen v. Borden**, 1963, 373 U. S. 690, 696 n. 7, 83 S. Ct. 1423, 1427, n. 7, 10 L. Ed. 2d 638). But so long as the Board continues to adhere to its position, its exclusive jurisdiction must be respected. Moreover, the issue of whether the violation of the duty of fair representation is or is not an unfair labor practice is not presented in the instant case. That question can only be presented in a case which is decided by the Board in the first instance, and is then presented to this Court on review of the Board's decision. Here the only question presented is whether a violation of the duty of fair representation is "arguably" an unfair labor practice, and the Board's decisions on the subject obviously show that it is.

Recognizing the foregoing as the real issue presented in the case at bar the Court of Appeals found that it is at least arguable that Petitioners' allegations, if true, would constitute unfair labor practices within the protection of Section 7 and prohibition of Section 8 of the Act, and, therefore, ruled that Petitioners' allegations are not "within the cognizance of federal and state courts" (Appendix A, pages 22, 23; Petition for Writ of Cert.).

Thus, Petitioners are precluded from maintaining any action in state or federal courts based on unfair representation by reason of the aforementioned preemption doctrine. Even were we to assume, *arguendo*, that such

doctrine were not applicable here, these Respondents' motion to dismiss Petitioners' second amended complaint (R. 204-206) merits sustention on the other grounds set forth therein.

With respect to Petitioners' claims of unfair representation based on an alleged conspiracy between the union and Sterling while no labor agreement was in effect to include certain clauses in the labor agreement which gave the company the right to relocate the St. Charles, Missouri plant and terminate the employment of the machinist employees, the Court of Appeals pointed out that such claims lacked substance. The Court of Appeals found that:

> "In 1961, in settlement of a five month strike at Sterling's St. Charles plant, the Union and Sterling negotiated a two-year contract to terminate February 28, 1963. A major issue involved severance pay and a chief topic of discussion was the possibility that Sterling might move its production from St. Charles, Missouri. Initially, Sterling adamantly refused to consider any such provision because it had been concluded due to many factors that the St. Charles operation could no longer be profitably maintained. However, the negotiated contract contained an express provision recognizing Sterling's right to permanently close the St. Charles plant at any time during the contract term or to permanently discontinue all or part of any department and terminate the involved employees (Appendix A, page 11, Petition for Writ of Cert.).
>
> "The contract called for termination allowances for the employees scaled to their length of service but to be effective only if the St. Charles operations were relocated during the life of the contract. Sterling was relieved of its obligation to pay the seniority termination allowance if the plant closure or department phase-out occurred after the expiration

of the two year contract (Appendix A, page 12, Petition for Writ of Cert.).

* * *

"Preliminarily, we reiterate that the provision allowing Sterling to move its plant and terminate its employees resulted from negotiations during the course of a strike and was in fact the *ratio essendi* of the bargaining agreement. * * * The complaint uses language of hostile discrimination and similar verbiage in characterizing the Union's activity when in fact there was no discrimination whatsoever as all employees were treated alike. Further, the broad and colorful language suggesting that the Union was inimical to its constituents was not supported by any allegation of bribery, preference or anything else that would be indicative of substance to plaintiffs' broad charges" (Appendix A, page 19, Petition for Writ of Cert.).

With respect to Petitioners' claims of unfair representation based on the Union's alleged failure to process grievances in behalf of Petitioners against Sterling the case of **Republic Steel Corp. v. Maddox**, supra, precludes Petitioners from maintaining an action thereon in federal or state court where, as here, Petitioners admittedly have failed to attempt use of the contract grievance procedure. The affidavit of Petitioner John Moody, filed by Petitioners in U. S. District Court on February 9, 1965 (R. 148-151), states that at all relevant times he was either chief shop steward or shop steward and an employee of Sterling, and then goes on to declare:

"Affiant further states that each of the Exhibits identified as 'Grievances' and numbered Exhibit 3 (a through h) have been duly filed with the Defendant Sterling. **These Grievances have never been processed beyond the mere act of filing the Grievances.** No Grievance was ever taken to step One as provided in Exhibit A (page 8). **The processing of the said Griev-**

ance in behalf of Machinist Union employees of Defendant Sterling is one of the responsibilities of this affiant as Chief Shop Steward.'' (Emphasis supplied.)

It is crystal clear from the foregoing that Petitioners have made no effort to comply with the contract grievance procedure. Petitioners stated on page 20 of their brief to the Court of Appeals that **the Grievance Procedure was specifically designed ''to keep Union Business Representatives OUT of Grievance Procedures until the Company and the employees (working through Stewards) had exhausted the first two steps of the Procedure.''** Thus, the processing of the grievances about which Petitioners complain never reached the third step at which point the Union Business Representative first enters into the grievance procedure. Respondent Union's and union Business Representative's responsibility under the grievance procedure not having arisen, they cannot be charged with having failed to perform duties of representation, much less to have performed those duties unfairly. The Court of Appeals found that the evidence before the District Court conclusively showed that Petitioners have never attempted to process any unresolved grievance even to Step 1 of the grievance procedure. The Court of Appeals thus held that Petitioners had no standing in federal court for any alleged claims for breaches of contract under the controlling doctrine announced in **Republic Steel Corp. v. Maddox** (Appendix A, page 21, Petition for Writ of Cert.).

CONCLUSION.

In light of the foregoing facts and authorities Respondent Unions and Business Representatives submit that the District Court's Orders of January 21, 1965 and July 1, 1965, and the Eighth Circuit Court of Appeal's Order of September 2, 1966, affirming the judgment of the District Court sustaining these Respondents' Motions to Dismiss Petitioners' Second Amended Complaint were all correct

and proper. Petitioners did not allege a breach of the collective bargaining agreement as against Respondent Unions and Union representatives, and, therefore, the District Court did not have jurisdiction over these Respondents under Section 301, nor under any other laws of the United States or the Constitution of the United States. The claims of unfair representation leveled against these Respondents sound in tort rather than in contract, and are, at least, arguably protected by Section 7 or unfair labor practices prohibited by Section 8 of the Act. They are, therefore, subject to the exclusive, primary jurisdiction of the National Labor Relations Board.

In any event, it is indisputable on the record that Petitioners failed to attempt to make use of the contract grievance procedure, and are, therefore, precluded from filing and maintaining suit for any claim subject to the grievance procedure. It is, furthermore, clear under the law and the instant collective bargaining agreement, that Petitioners have no standing or right to obtain a court order requiring Respondent Sterling to bargain and/or arbitrate with their Chief Steward and Stewards.

These Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

State of Missouri, }
County of St. Louis. } ss.

I, Donald S. Siegel, counsel for Respondent Unions and Business Representatives herein, and one of their attorneys of record in the Court below, being duly sworn deposes and say that on February 2, 1967, I duly served four copies of the foregoing Brief in Opposition, as required by the Rules of the Supreme Court of the United States, by mailing such copies to

(a) Jerome J. Duff, counsel and attorney of record for the Petitioners, in care of his office, Suite 1155, 818 Olive Street, St. Louis, Missouri 63101, and

(b) Daniel Bartlett and William Stix of Bartlett, Stix and Bartlett, attorneys of record for Respondent Sterling Aluminum Products, Inc., in care of their office, Suite 405, 408 Pine Street, St. Louis, Missouri 63102, respectively.

Donald S. Siegel,
Member of the Bar of the United
States Supreme Court.